Supreme Court, U.S.
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No. 09-208

In The Supreme Court of the United States

EUGENE WRINN, JR.,
Petitioner,

v.

DAREN JOHNSON, G.K. MANLEY, AND K.J. KOVERMAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF GRANTING THE WRIT

ARGUMENT

Wrinn has been barred by a state-created immunization or jurisdictional rule from seeking redress for violations of his federal civil rights. And it is the Ohio Court of Claims that will make the threshold determination of whether the automatic waiver is void based upon the employees' conduct. Respondents contend that this bar is constitutional because Ohio gives up its sovereign immunity in the Ohio Court of Claims Act ("OCCA") in exchange for the waiver of all other related claims, including federal claims. The application of this idiosyncratic rule violates the Supremacy Clause by nullifying a federal right.[1] It is for these reasons that the Supreme Court of Ohio ruled in *Conley v. Shearer* that the OCCA was not applicable to federal claims.[2] The Sixth Circuit disregarded *Conley* and Respondents continue to do so by advocating a strained and narrow interpretation of the case.

Moreover, the Sixth Circuit did not have the guidance from this Court as to the interplay between state jurisdictional statues and § 1983 claims established months later in *Haywood v. Drown*.[3] This Court should grant Wrinn's petition for certiorari,

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[1] *Haywood v. Drown*, 129 S. Ct. 2108, 2115 (2009) (confirming such a practice violates the Supremacy Clause). *See* discussion, *infra*, at section C.

[2] 64 Ohio St.3d 284, 595 N.E.2d 862, 869 (Ohio 1992).

[3] *Haywood v. Drown*, 129 S. Ct. 2108.

vacate, and remand, to have Wrinn's appeal examined under the Supremacy Clause in light of *Haywood*[4] and under the Supreme Court of Ohio's interpretation of state law.[5]

If this Court does not vacate and remand, it should exercise its supervisory powers and consider the important constitutional and federalism issues raised by the merits of Wrinn's appeal. Without this relief, countless other plaintiffs will be likewise subjected to Ohio's across-the-board nullification of federal civil rights.

A. The OCCA waiver provision violates the Supremacy Clause.

Contrary to Respondents' contention in its brief in opposition to the petition for writ of certiorari, the Sixth Circuit did not address Wrinn's Supremacy Clause arguments. Although the Sixth Circuit stated that it based its decision on *Leaman*[6] and *Thomson*,[7] it did not, as Respondents assert, state that its *Leaman* or *Thomson* holdings "dictated the outcome of Wrinn's Supremacy Clause challenge," or otherwise incorporate any Supremacy Clause analysis from either of those

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[4] 129 S. Ct. 2108. *See infra*, at section C.

[5] *Conley*, 64 Ohio St.3d 284, 595 N.E.2d 862. *See infra*, at section B.

[6] *Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 825 F.2d 496 (6th Cir. 1987) (en banc).

[7] *Thomson v. Harmony*, 65 F.3d 1314, 1318-19 (6th Cir. 1998).

decisions.[8] Nor does the decision below cite or reference *Howlett v. Rose*[9] or any other Supremacy Clause precedent.[10]

Even assuming that a Supremacy Clause analysis can be implied from the decision below, Respondents' reliance on *Town of Newton v. Rumery*[11] and the analogy to the enforceability of criminal release-dismissal agreements is misplaced.[12] In *Rumery*, the Court applied federal common law to the question of whether release-dismissal agreements were per se unenforceable because of their potential to undermine the broad remedial purpose of § 1983.[13]

The Court looked to the Second Restatement of Contracts for the principle that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy

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[8] *See* Brief in Opposition at 6, n.1; App. 6a-7a. In fact, the *Thomson* majority opinion did not address or raise any issue with the Supremacy Clause. Rather, the *Thomson* court restated the *Leaman* analysis regarding the waiver provision and the purported *quid pro quo*. 65 F.3d at 1318-19.

[9] 496 U.S. 356 (1990).

[10] In *Haywood*, this Court emphasized that "[w]e have never treated a state's invocation of 'jurisdiction' as a trump that ends the Supremacy Clause inquiry." 129 S. Ct. at 2117 citing *Howlett*, 496 U.S. at 382-83 (internal citations omitted).

[11] 480 U.S. 386 (1987).

[12] Brief in Opposition at 6-9.

[13] 480 U.S. at 392.

harmed by enforcement of the agreement."[14] Applying these contract principles to the specific release-dismissal agreement before it, the Court refused to find release-dismissal agreements per se invalid. A plurality of the Court found that Rumery had waived his federal civil-rights claims because the particular release-dismissal agreement satisfied a three-part test: (1) the agreement was voluntarily made; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement did not adversely affect the relevant public interests.[15]

Rumery and its three-part test do not apply to Wrinn's case or to the OCCA's waiver provision. This is not a case about the administration of criminal justice; no prosecutorial discretion was involved; there is no complaining witness's interests at stake; Wrinn's counsel did not draft the OCCA; and neither Wrinn nor his counsel engaged in an arms-length bargain with the State of Ohio.[16] The OCCA's waiver provision is automatically applied to invalidate Wrinn's § 1983 claims.[17] Wrinn did not voluntarily waive his right to bring his federal claims. Rather, pursuant to a justified reliance on the Supreme Court of Ohio's

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[14] *Id.*

[15] *Id.* at 398. Recognizing that § 1983 actions "to vindicate civil rights may further significant public interests," the Court reasoned that other public interests could be served by allowing such agreements and considered the criminal defendant's personal interests in waiving his § 1983 claims. *Id.* at 395, 397-98.

[16] *Id.* at 392.

[17] *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:72, 9-186 (4th ed. 1997).

interpretation of the OCCA in *Conley*,[18] Wrinn filed a federal civil-rights action against the individual officers in federal court and then filed a state action against the State of Ohio in the Court of Claims.

Respondents' reliance on *Rumery* underscores the need to grant Wrinn's petition to determine how *Rumery* would apply to Wrinn's case, if at all. This Court should grant Wrinn's petition to consider the adverse effect on the public interest in requiring all potential civil-rights plaintiffs to universally and prospectively waive federal civil-rights claims unless and until the Ohio Court of Claims determines whether the waiver is void.[19]

B. The OCCA waiver provision does not apply to claims brought under federal law.

This Court should also grant the writ to ensure that the Sixth Circuit applies Ohio law as interpreted by Ohio's highest court. Respondents argue that the Supreme Court of Ohio's interpretation of the OCCA in *Conley*[20] is not controlling by understating the holding

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[18] 64 Ohio St.3d 284, 595 N.E.2d at 869.

[19] Under the construct established by the Sixth Circuit, civil-rights plaintiffs like Wrinn have to incur the expense and time of filing both in federal court against individual employees and against the State in the court of claims, have their federal action dismissed while the state court action is stayed, file a motion to have the state court determine some years down the line whether the OCCA waiver is void under OHIO REV. CODE § 2743.02(A)(1), before being able to proceed on the merits in either action. The result is absurd.

[20] 64 Ohio St.3d 284, 595 N.E.2d 862.

in that case. Although it is true that the direct question on appeal in *Conley* was whether the procedural mechanism in OHIO REV. CODE § 2743.02(F) violated the Equal Protection Clause, the court's decision about the OCCA's impact on federal claims is broader than subsection F and cannot rationally be limited to it.

The court in *Conley* sua sponte raised the Supremacy Clause issue, ruled categorically, and stated without qualification that – "R.C. 2743.02 and R.C. 9.86 . . . do not apply to claims brought under federal law."[21] The court could have limited its holding to subsection F's procedural mechanism – but it did not and its holding clearly states that the entirety of OHIO REV. CODE § 2743.02 does not apply to federal claims. In contrast to the Sixth Circuit's decision below, *Conley* relied upon the reasoning of this Court in *Howlett*[22] and recognized that state laws cannot have the effect of impairing federal claims.[23]

Respondents' narrow interpretation of *Conley* ignores the Supreme Court of Ohio's analysis and reasoning. As a result, Respondents insist that Ohio law still relegates to the Ohio Court of Claims the right to decide whether Wrinn may proceed with his § 1983 claims. According to Respondents, Wrinn has waived his federal claims unless the Ohio Court of Claims determines under OHIO REV. CODE § 2743.02(A)(1) that the waiver is void because the

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[21] *Id.* at 869.

[22] 496 U.S. 356.

[23] 64 Ohio St.3d 284, 595 N.E.2d at 869-70.

individual state employees acted beyond the scope of their employment, or acted with malicious purpose, in bad faith, or in a wanton or reckless manner.[24]

This interpretation of the OCCA and *Conley* cannot pass constitutional muster because the determination of the Ohio Court of Claims would necessarily go beyond the OCCA and affect Wrinn's § 1983 claims. That court would use the same procedural mechanisms under § 2743.02(A)(1) to determine if the waiver is void as it would to determine individual immunity under Ohio law and that a federal court would use to determine federal immunity under federal common law. That, however, is precisely the state control over a § 1983 claim that the Supreme Court of Ohio held is beyond "R.C. 2743.02 and R.C. 9.86" because it subordinates federal claims to Ohio's policy regarding immunity.[25] And it effectively acts as state-created immunity condemned by *Haywood*.[26]

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[24] *See* OHIO REV. CODE § 2743.02(A)(1); *Tweed v. Wilkinson*, No. 97-3661, 1998 U.S. App. LEXIS 8535, at *2 (6th Cir. Apr. 29, 1998).

[25] This Court has long held that the waiver of federal rights must be examined under federal common law. *See, e.g., Rumery*, 480 U.S. at 392.

[26] Respondents argue that the Sixth Circuit's decision is in line with other Circuit Court rulings regarding state-created immunities. (Brief in Opposition at 11-12). However, the assertion that "[t]he Sixth Circuit agrees that federal law preempts any State law that immunizes government conduct otherwise subject to suit under § 1983" assumes that the OCCA does not effectively immunize state actors from § 1983 liability. Petitioner contends that it does. Respondents apparently agree that if the OCCA

C. This Court should grant the writ to ensure that *Leaman*'s en banc ruling is considered under the breadth of this Court's Supremacy Clause ruling in *Haywood*.

Respondents contend that *Rumery*, a criminal case whose applicability to the OCCA is not immediately apparent, is controlling, while simultaneously contending that *Haywood*, a § 1983 case considering a Supremacy Clause challenge to a state jurisdictional statute, is not. Respondents have it backwards.

At the time of the decision below, the Sixth Circuit had this Court's precedent in *Howlett*[27] as guidance and ignored it.[28] Shortly after the decision below, this Court expanded *Howlett's* holding and ruled that its reasoning was not limited to state immunity statutes.[29]

Respondents ascribe a narrow holding to *Haywood*,[30] but *Haywood* is unquestionably broader than *Howlett*, and is controlling here. If *Haywood* was limited in its application only to statutory grants of

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waiver is effectively an immunization, it cannot withstand the Supremacy Clause challenge.

[27] 496 U.S. 356.

[28] Apx. C to Petition for Writ of Certiorari, Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio granting the OSHP officers' Motion to Dismiss.

[29] *Haywood*, 129 S. Ct. 2108.

[30] *Id.*

immunity, then *Howlett* would have been dispositive.[31] *Haywood*, however, dealt with New York's jurisdictional divestment, similar to Ohio's, and found that a state cannot use its jurisdictional rule or policy as "a device to undermine federal law."[32] This Court declared that although "[s]tates retain substantial leeway to establish the contours of their judicial systems,"[33] states cannot "nullify a federal right or cause of action they believe is inconsistent with their local policies."[34] Accordingly, the Court found that New York's law limiting the types of § 1983 claims that could be brought against state employees ran afoul of the Supremacy Clause because it was "contrary to Congress's judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages."[35]

Without direction from this Court to reconsider the decision below in light of this intervening precedent, the Sixth Circuit will persist in applying its outdated pre-*Haywood* en banc ruling.[36] Respondents did not demonstrate how, without the involvement of this

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[31] *Id.* at 2115, n.5.

[32] *Id.* at 2116.

[33] *Haywood*, 129 S. Ct. at syllabus.

[34] *Id.*

[35] *Id.* (emphasis in original). "[Section] 1983, a Reconstruction-era statute, was passed to interpose the federal courts between the states and the people, as guardians of the people's federal rights." *Id.* at 2114 (internal citations omitted).

[36] *Leaman*, 825 F.2d 496.

Court, any district court or panel of the Sixth Circuit will have the authority to consider whether *Haywood* or *Conley* undermined *Leaman*'s en banc ruling.[37] As the Respondents would have it, all constitutional challenges to the OCCA's waiver provision in light of *Haywood* – and any other future decisions from this Court bearing on this issue – will receive their first and only consideration on petition for writ of certiorari. Rulings from this Court must be afforded more significance than this in cases still on direct appeal.

Moreover, the Sixth Circuit is the only Circuit in the nation with a state that has adopted a per se waiver rule that is a jurisdictional limitation on federal civil-rights claims. The question, therefore, of whether such a scheme is effectively an immunization, an unlawful defense, a procedural bar, or a device designed to undermine federal law will not be heard in any other Circuit.[38]

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[37] Indeed, the district court below felt compelled to disregard the Supreme Court of Ohio's interpretation of Ohio law that it found to be directly in conflict with the en banc ruling in *Leaman*. Apx. C to Petition for Writ of Certiorari, Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio granting the OSHP officers' Motion to Dismiss; *see also id.* at n.1 (noting that it was a dissenter of the en banc *Leaman* decision who authored a subsequent panel opinion following *Leaman*, "demonstrat[ing] the impact and authority of an en banc decision") (citing *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 460 (6th Cir. 1998)).

[38] *Haywood*, 129 S. Ct. at 2116. Moreover, other states both inside and outside of the Sixth Circuit could be empowered to enact similar statutory schemes to shield themselves from federal civil-rights claims without any oversight.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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